

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL DeNICTOLIS,

Petitioner,

V.

KATHLEEN M. DENNEHY,

Respondent.

Civil Action No. 04-12047-RGS

**MOTION TO DISMISS
PETITION FOR WRIT OF HABEAS CORPUS**

Kathleen M. Dennehy, the respondent in the above-captioned matter, hereby moves for dismissal of the petition for a writ of habeas corpus filed by Michael DeNictolis (“the petitioner”). As grounds for this motion, the respondent states that the petitioner has not received permission from a three-judge panel of a Court of Appeals to file a successive habeas petition, as he must pursuant to 28 U.S.C. § 2244(b). Since the petitioner has not met this jurisdictional threshold, his habeas petition must be dismissed.

The law governing federal habeas review establishes a presumption that, barring unusual circumstances, a second or subsequent application for habeas corpus shall be denied or dismissed. 28 U.S.C. § 2244(b); *see also Felker v. Turpin*, 116 S.Ct. 2333, 2340 (1996). An applicant seeking to file a second or successive petition must make a prima facie showing to the “gatekeeper,” a three judge panel of the Court of Appeals, that the application falls within the exceptional circumstances permitting the filing of a second or subsequent application. *See* 28 U.S.C. § 2244(b)(3)(C). If, and only if, a petitioner makes such a showing may the Court of

Appeals allow the second or subsequent application to be filed. *See Felker v. Turpin*, 116 S.Ct. at 2239-2340. Here, the petitioner has not made such a showing and has not received the permission of the Court of Appeals to file his second or subsequent petition.

WHEREFORE the respondent respectfully requests that this Court dismiss the petition for habeas corpus in its entirety.

Respectfully submitted,

KATHLEEN M. DENNEHY,

By her attorney,

THOMAS F. REILLY
ATTORNEY GENERAL

/s/ Maura D. McLaughlin
Maura D. McLaughlin
Assistant Attorney General
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Dated: February 7, 2005

Certification Pursuant to Local Rule 7.1

I hereby certify that I have attempted, in good faith, to confer with Rosemary Curran Scapicchio, Esq., counsel for the petitioner, in an effort to resolve the issues raised by the foregoing motion.

/s/ Maura D. McLaughlin
Maura D. McLaughlin